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IN THE
COURT OF APPEALS OF INDIANA

GERARDO RODRIGUEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0710-CR-475
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0602-FA-00018

JULY 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Gerardo Rodriguez appeals his convictions and sentences for possession of methamphetamine with intent to deliver weighing three grams or more, a Class A felony, Ind. Code § 35-48-4-1(a)(2)(C) and (b)(1); possession of cocaine with intent to deliver weighing three grams or more, a Class A felony, Ind. Code § 35-48-4-1(a)(2)(C) and (b)(1); dealing in methamphetamine weighing three grams or more, a Class A felony, Ind. Code § 35-48-4-1(a)(1)(C) and (b)(1); and possession of marijuana weighing thirty grams or more, a Class D felony, Ind. Code § 35-48-4-11(1) and (i).

We affirm.

Rodriguez presents five issues for our review which we restate as four:

I. Whether the trial court committed fundamental error by admitting evidence seized by police during a search of Rodriguez's home.

II. Whether the trial court erred when it instructed the jury.

III. Whether the State presented evidence sufficient to sustain Rodriguez's convictions.

IV. Whether Rodriguez was properly sentenced.

In February 2006, Rodriguez, an illegal alien, sold drugs to a confidential informant. Shortly thereafter on the same evening, police searched Rodriguez's residence. As a result of the search, police found and seized illegal drugs and drug paraphernalia. Based upon the drug sale and the search of his residence, Rodriguez was charged with Count I possession of methamphetamine with intent to deliver weighing three grams or more, Count II possession of cocaine with intent to deliver weighing three grams or more, Count III dealing methamphetamine weighing three grams or more, and Count IV possession of marijuana weighing thirty grams or more. Following a jury trial

at which he was convicted of all charges, Rodriguez was sentenced to an aggregate sentence of sixty (60) years. This appeal ensued.

Rodriguez contends that the trial court committed fundamental error by admitting the evidence seized by police in the search of his home. Rodriguez concedes that he failed to properly preserve his claim of error by objecting when the State offered this evidence at trial. *See O'Neal v. State*, 716 N.E.2d 82, 86 (Ind. Ct. App. 1999), *reh'g denied, trans. denied* (defendant must make timely objection to allegedly erroneous admission of evidence to preserve error for appeal). In order to avoid waiver of this issue, Rodriguez bases his appeal on the fundamental error exception. The fundamental error exception is extremely limited. *Book v. State*, 880 N.E.2d 1240, 1248 (Ind. Ct. App. 2008), *trans. denied*. This exception to the waiver rule is available only where the error constitutes a clearly blatant violation of basic principles of due process and the harm or potential for harm cannot be denied. *Id*.

We pause to note that Rodriguez alleges error only in the trial court's admission of the items recovered during the search and not in the admission of the testimony of Officer Bogart describing these items and his discovery of them in Rodriguez's residence. Therefore, even if the trial court erred in admitting the items obtained as a result of the search, such error would likely be deemed cumulative and thus harmless. *See McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *reh'g denied*, *trans. denied*, 878 N.E.2d 206 (any error caused by admission of evidence is harmless error if challenged evidence is merely cumulative of other evidence properly admitted). Thus, we find no error, fundamental or otherwise.

For his second claim of error, Rodriguez asserts that the trial court erred when it instructed the jury. Just as he did with the first issue, Rodriguez concedes that this alleged error was not preserved for appeal by an objection at trial. *See Dickenson v. State*, 835 N.E.2d 542, 548 (Ind. Ct. App. 2005), *trans. denied* (failure to object to jury instructions waives issue on appeal). Accordingly, he claims the trial court's error was fundamental. As we stated previously, the fundamental error rule applies only when the error constitutes a blatant violation of basic principles of due process and the harm or potential for harm is substantial. *Book*, 880 N.E.2d at 1248.

Rodriguez claims that the trial court's instructions to the jury regarding the elements of each offense were erroneous. The instructions stated that if the State failed to prove the elements of each offense beyond a reasonable doubt, the jury "should" find Rodriguez not guilty. Rodriguez argues that the instructions should state that the jury "must" find Rodriguez not guilty if the State failed to prove the elements beyond a reasonable doubt. He maintains that use of the term "should" instead of the term "must" misled the jury as to the correct standard for determining guilt.

"When determining whether a defendant suffered a due process violation based on an incorrect jury instruction, we look to the erroneous instruction not in isolation, but in the context of all relevant information given to the jury, including other instructions." *Dickenson,* 835 N.E.2d at 549. Where this information, considered as a whole, does not mislead the jury as to a correct understanding of the law, we find no due process violation. *Id*.

Here, the instructions adequately instructed the jury as to their duty if the State failed to prove the charges beyond a reasonable doubt. *See Ben-Yisrayl v. State*, 738 N.E.2d 253, 265 (Ind. 2000), *reh'g denied*, *cert. denied* (use of "should" adequately instructs jury as to proper course of conduct in event of failure of proof by State); *see also Holmes v. State*, 671 N.E.2d 841, 849 (Ind. 1996), *reh'g denied* (instruction that jury "should" find defendant not guilty if State failed to prove each element beyond reasonable doubt is proper). Moreover, as Rodriguez points out, the reasonable doubt instructions charged the jury: "If you find that there is a reasonable doubt that the defendant is guilty of the crime, you *must* give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration." (Tr. 155) (Emphasis supplied). Thus, the challenged instructions were not erroneous, particularly in light of the other instructions given.

In addition, Rodriguez claims error with the trial court's instructions to the jury regarding the alternate jurors. Again, in the absence of an objection at trial, Rodriguez has attempted to avoid waiver of this issue by claiming that the alleged mistake is a fundamental error.

Rodriguez contends that the trial court's preliminary instructions failed to define the role of the alternate jurors prior to deliberations. Whereas the final instructions specifically admonished the alternate jurors that they were prohibited from engaging in the deliberations and voting, the preliminary instructions did not contain such a prohibition. Rodriguez posits that the alternate jurors could have taken part in jury discussions during court recesses based upon the preliminary instructions they received.

During *voir dire*, the State explained to the prospective alternate jurors:

> If you were selected you'd probably have the hardest jobs because you'd have to sit there and be quiet the whole time. You're not allowed to engage in the deliberations unless one of [the] juror members has to be excused for any reason.

(Tr. 125-26). The trial court charged the jury during final instructions, in pertinent part, as follows:

> I am also sending the alternate jurors to the jury room during deliberations. The alternate jurors are specifically admonished and advised at this time that they are only entitled to listen to the deliberations of the jury and are specifically prohibited from participating in any of the deliberations by the jury and are also specifically prohibited from voting with the jury.

Appellant's Appendix at 85.

In reviewing all of the relevant information given to the alternate jurors, *see Dickenson*, 835 N.E.2d at 549 (determining whether defendant suffered due process violation based on incorrect jury instruction by looking to erroneous instruction in context of all relevant information given to jury), we cannot say that the preliminary instruction in this case resulted in a blatant violation of basic principles of due process with a potential for substantial harm. Rodriguez does not argue or point to any evidence that demonstrates that his suggestion that an alternate participated in deliberations or discussion during court recesses is any more than pure speculation. Moreover, "[t]he element of harm is not shown by the fact that a defendant was ultimately convicted; rather, it depends upon whether his right to a fair trial was detrimentally affected." *Taylor v. State*, 687 N.E.2d 606, 610 (Ind. Ct. App. 1997), *trans. denied*. Moreover, Rodriguez has not demonstrated how he would have been substantially harmed by an

alternate's participation in any discussion prior to the commencement of deliberations. Thus, the error, if any, did not rise to the level of fundamental error. *See e.g. Taylor*, 687 N.E.2d 606 (holding that trial court's error in giving *final* instruction that alternate juror would retire with jury to deliberate without also instructing that alternate was not to participate in deliberations did not rise to level of fundamental error).

For his next allegation of error, Rodriguez argues that the State failed to present evidence sufficient to support three of his four convictions. Specifically, he challenges the State's proof of his possession of methamphetamine, cocaine and marijuana. With regard to Rodriguez's possession of methamphetamine and cocaine, Ind. Code § 35-48-4-1(a)(2)(C) and (b)(1) provide that a person who possesses with intent to deliver cocaine or a narcotic drug commits dealing in cocaine or a narcotic drug. The offense is a Class A felony if the amount of the drug involved weighs three (3) grams or more. The offense of possession of marijuana is set out in Ind. Code § 35-48-4-11 which provides that a person who knowingly or intentionally possesses marijuana commits possession of marijuana. The offense is a Class D felony if the amount involved is more than thirty (30) grams.

Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id*. Moreover, we are mindful that the

trier of fact is entitled to determine which version of the incident to credit. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986), *reh'g denied*.

Possession of an item may be either actual or constructive. *Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004). Actual possession occurs when a person has direct physical control over the item. *Causey v. State*, 808 N.E.2d 139, 143 (Ind. Ct. App. 2004). On the other hand, a person has constructive possession of an item when the person has (1) the intent to maintain dominion and control over the item and (2) the capability to maintain dominion and control over the item. *Id*.

The element of intent is proven by demonstrating the person's knowledge of the presence of the item. *Grim v. State*, 797 N.E.2d 825, 831 (Ind. Ct. App. 2003). Such knowledge may be inferred from either exclusive dominion and control over the premises containing the item, or, if the control is non-exclusive, from evidence of additional circumstances indicating the defendant's knowledge of the presence of the contraband. *Id*. These additional circumstances have been found to include: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs; (5) location of the drugs within the defendant's plain view; and (6) location of the drugs in close proximity to items owned by the defendant. *Donnegan v. State*, 809 N.E.2d 966, 976 (Ind. Ct. App. 2004), *trans. denied*. The second element of constructive possession, the person's capability to exercise control over the item, must also be demonstrated. This component includes the ability to reduce the item to the person's personal possession or to otherwise direct its disposition or use. *Id*. Proof of a possessory interest in the premises in which

the drugs are found is adequate to show the capability to maintain dominion and control over the items in question. *Id*. at 976-77.

The facts most favorable to the verdict include that immediately preceding the discovery of the drugs in Rodriguez's residence, Rodriguez sold a large amount of methamphetamine to a confidential informant. The jury also heard that Rodriguez lived in the house with David Lozano and two other people, that a backpack containing drugs and drug paraphernalia did not belong to Lozano and that Lozano did not go into the basement. There was testimony of the substantial evidence indicative of narcotics dealing in the basement of the house and of the recovery of a backpack containing drugs and drug paraphernalia located in plain view under a pool table in a room with no other furniture. Further, the jury heard that the police found drug paraphernalia commingled with Rodriguez's possessions, including a semi-automatic handgun, two bundles of cash, plastic baggies, a razor blade and a set of digital scales, in the middle bedroom which was occupied by Rodriguez. Police also recovered drug paraphernalia and cash in the upstairs closet, which was used by Rodriguez. In light of the foregoing evidence and inferences to be drawn therefrom, we find the evidence is sufficient to sustain the convictions.

Finally, Rodriguez asserts that he was not properly sentenced. He claims the trial court used an improper aggravating circumstance, imposed an excessive term, and imposed an inappropriate sentence. A court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). Although this statute allows for the imposition of any

sentence within the statutory range without regard to mitigating or aggravating circumstances, it is worth noting that the statute does not prohibit the trial court from identifying facts in mitigation or aggravation. *Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. 2007), *reh'g granted, decision clarified on other grounds*, 875 N.E.2d 218 (Ind. 2007).

Here, in listing the aggravating circumstances, the trial court noted that this case involves multiple convictions consisting of four separate felony offenses. Rodriguez maintains that this is an improper aggravating factor. He alleges that the court's use of this aggravator is similar to the court's use of the elements of an offense to increase a sentence. This aggravating circumstance does not use an element of the offenses to increase Rodriguez's sentence, and our supreme court has found this to be a proper aggravating factor. *See Brooks v. State*, 560 N.E.2d 49, 60 (Ind. 1990) (stating that trial courts may consider multiple convictions for multiple offenses as aggravating circumstance that supports imposition of enhanced or consecutive sentences).

Next, Rodriguez, citing Ind. Code § 35-50-1-2(c), claims that his consecutive sentences improperly exceed the advisory sentence for the felony which is one class higher than the most serious felony for which he was convicted. Rodriguez's aggregate sentence is sixty (60) years, and the most serious felony for which Rodriguez was convicted is an A felony. The felony which is one class higher than an A felony is murder, for which the advisory sentence is fifty-five (55) years. *See* Ind. Code § 35-50-2-3.

In his cursory argument, Rodriguez completely fails to mention that Ind. Code § 35-50-1-2(c) only applies to felony convictions arising out of an episode of criminal conduct. An "episode of criminal conduct" is defined by statute as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b). In addition, we have further explained that the singleness of a criminal episode should be based on whether the alleged conduct was so closely related in time, place, and circumstance that a complete account of one charge cannot be related without referring to details of the other charge. *Johnican v. State*, 804 N.E.2d 211, 217 (Ind. Ct. App. 2004).

A complete account of Count III, dealing in methamphetamine, can be conveyed without referring at all to the other charges. This charge is based on Rodriguez's sale of methamphetamine to a confidential informant in the parking lot of a fast food restaurant. The remaining three charges stem from the search of Rodriguez's residence. Thus, although related, these offenses do not constitute an episode of criminal conduct so as to limit the trial court's sentencing of Rodriguez.

Rodriguez concludes with the argument that his sentence is inappropriate. Under Article VII, Section 6 of the Indiana Constitution, we have the constitutional authority to review and revise sentences. However, we will not revise the sentence imposed unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

With regard to the nature of the offense, the advisory sentence is the starting point in our consideration of an appropriate sentence for the crime committed. *Childress*

v. State, 848 N.E.2d 1073, 1081 (Ind. 2006). Rodriguez was convicted of three Class A felonies and one Class D felony. A Class A felony carries an advisory sentence of thirty (30) years, and a Class D felony has an advisory sentence of 1 ½ years. Ind. Code §§ 35-50-2-4 and -7. Rodriguez received thirty (30) years on Count I, enhanced by twenty (20) years. The sentences on Counts II (thirty years) and IV (1 ½ years) are to run concurrent to Count I. For Count III, Rodriguez received a sentence of thirty (30) years to run consecutive only to Count II. The result is an aggregate sentence of sixty (60) years. Further consideration of the nature of this offense reveals that Rodriguez deals in large quantities of illegal drugs. The basement of his residence contained an entire set-up for dividing and packaging drugs, as well as scales and other drug paraphernalia located throughout the house, particularly in Rodriguez's bedroom.

With regard to Rodriguez's character we note, as did the trial court, that Rodriguez is in this country illegally. He has three misdemeanor convictions, and he was on probation when this offense occurred. Police found a fake birth certificate that belonged to Rodriguez, and he provided the court in this proceeding with four different dates of birth.

Rodriguez has not carried his burden of persuading this Court that his sentence has met the inappropriateness standard of review. *See Anglemyer*, 868 N.E.2d at 494 (declaring that defendant must persuade appellate court that his sentence has met inappropriateness standard of review). In light of the nature of the offense and the character of Rodriguez, the sentence is not inappropriate.

Based upon the foregoing discussion and authorities, we find no fundamental error with regard to the admission of evidence obtained as a result of the search warrant, or with the instructions of the trial court. In addition, we conclude that the State presented evidence sufficient to sustain Rodriguez's convictions and that the sentence imposed by the trial court was not inappropriate.

Affirmed.

ROBB, J., and CRONE, J., concur.